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No. 92-——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HARRY EDWARD STONE,
Petitioner,

v.

JOHN SHAW and ROBERT BUTTERWORTH,
Attorney General, STATE OF FLORIDA,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Was the Petitioner's Sixth Amendment Right of Confrontation in a sexual battery case violated when the Trial Court allowed over objection, the admission of hearsay testimony of the child/victim through the testimony of the child's mother and her friend.

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OPINION BELOW

The Opinion of the Florida State Appellate Court of *Stone v. State of Florida*, 547 So.2d 657 (Fla. 2nd DCA 1989) appears in the Appendix at (App. E, p. 27a).

Petitioner Mr. Stone's Writ of Habeas Corpus appears in the attached Appendix (App. D, p. 9a).

The Report and Recommendation of the United States Magistrate pertaining to the Petition for Writ of Habeas Corpus is found in (App. C, p. 4a).

Order of the District Court for the Middle District of Florida accepting the findings of the Report and Recommendation of the Magistrate is found in (App. B, p. 2a).

The Decision of the United States Court of Appeals for the Eleventh Circuit, rendered March 17, 1992 and the Order Denying the Petition for Rehearing rendered April 24, 1992 are found in Appendix (App. A, p. 1a, and App. F, p. 34a).

JURISDICTIONAL STATEMENT

The Judgment of the United States Court of Appeal for the Eleventh Circuit, was entered on August 17, 1987. This Court has jurisdiction pursuant to 28 U.S. Code Sections 1254(1). Rule 10(1)(a), Supreme Court Rules.

CONSTITUTION AND STATUTE INVOLVED

Amendment Five, United States Constitution:

> No person shall be held to answer for a capital or other infamous crime unless on a presentment of indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment Six, United States Constitution:

> In criminal prosecutions, the accused shal enjoy the right to a speedy and pubic trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and causes of the accusations; to be confronted with witnesses against him; to have compulsory proc-

ess for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

Amendment Fourteen, United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Florida Statute Section 90.803(23) Hearsay Exception; Statement of child/victim:

> (a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:
>
> 1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and

2. The child either:

a. Testifies; or

b. is unavailable as a witness, provided that there is other corroborative evidence of the abuse of offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to section 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for it's ruling under this subsection.

Florida Statute, Section 90.403

Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. This section shall not be construed to mean that evidence of the existence of available third-party benefits is inadmissible.

Federal Rule 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue

delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE AND FACTS

The Petitioner was charged by the State of Florida in Indictment with one count of capital battery, a violation of Florida Statute 794.011(2). (App. G, 35a/36a)

The Indictment alleged that the Petitioner *Mr. Stone* placed his penis or mouth on the vagina of the child victim. The incident is alleged to have occurred sometime between November of 1984 and November of 1985. *Mr. Stone* was convicted on June 12, 1987 and was sentenced on the capital felony on August 7, 1987 to life imprisonment with a mandatory 25 year prison sentence before becoming eligible for parole consideration. *Mr. Stone* remains incarcerated. This conviction was appealed to the Second District Court of Appeals and the conviction was affirmed on May 26, 1989, found at *Stone v. State*, 547 So.2d 657 (Fla. 2nd DCA 1989). App. E, p. 27a)

Following *Mr. Stone's* affirmance in the State Appellate Court, he filed a Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Florida, Tampa Division, Case No. 90-1365-CIV-T-98C (App. D, p. 9a). An order denying the Petition entered on April 25, 1991. (App. B, p. 2a)

On June 18, 1991, United States District Court entered an order upon *Mr. Stone's* application for certificate of probable cause certifying that he had probable cause to proceed with his appeal to the Eleventh U.S. Court of Appeals. The United States Court of Appeals for the Eleventh Circuit in Case No. 91-3420 affirmed the District Court's findings on March 17, 1992 (App. A, p. 1a)

The State in it's proof alleged that the incident occurred sometime in October of 1985. At the time of the incident, the six year old child victim's parents were divorced and she lived with her mother. She occasionally spent the night at her father's home. The incident occurred while *Mr. Stone* was baby sitting the child victim at her father's home. *Mr. Stone* was the 19 year old brother of the child victim's father's girlfriend. (App. H, pp. 41a/46a-49a)

The victim child testified at trial. She was 8 years old at the time of the trial. She testified that *Mr. Stone* got on top of her when she was in bed and that this act hurt her private. (App. H, pp. 41a/49a)

She could not define the word "private". She was uncertain whether her private was below her waist. She could not remember who taught her the word. (App. H, pp. 49a/52a)

The victim child's mother testified that she had taught the word to the child to describe her genital area. (App. H, p. 42a)

The child also testified that *Mr. Stone* had licked her private. She stated that *Mr. Stone* placed a wash cloth on her private before he licked it. (App. H, pp. 49a/50a)

The child testified she did not know what she had on when he licked her private. (App. H, p. 51a)

She then testified that when *Mr. Stone* got on top of her she did not know whether she had her clothes on or off. (App. H, p. 51a)

Additionally she testified she had on a nightie and some underpants. (App. H, pp. 51a-52a)

She did not remember if *Mr. Stone* took her underpants off. (App. H, p. 52a)

On cross-examination, the victim child indicated it had happened more than twice, when in her deposition she

could only remember 2 times. (App. H, p. 50a) When questioned about the first time, she said it was when *Mr. Stone* was driving in her dad's truck. However, she did not know what happened in the truck, but later stated "nothing happened". (App. H, p. 50a)

The second time she was assaulted she stated it happened in the living room and he licked her private. In her deposition testimony, she did not remember what happened in the living room. (App. H, p. 51a)

The sexual assault was to have happened in her sister's room when *Mr. Stone* allegedly got on top of her and licked her private. The victim child stated he put a wash cloth on her first. In her deposition testimony, the only thing she could recall about the activities in her sister's bedroom was that *Mr. Stone* told her sister to turn around when he got on top of her. (App. H, p. 49a) Furthermore, she could not remember what *Mr. Stone* did to her when he got on top of her. (App. H, p. 52a)

She could not remember who else she had talked to about the allegations. She denied telling her friends what happened. She did not know whether her mother or her boyfriend had told her what to say in court (App. H, pp. 50a/52a) On re-direct examination, the state read several questions and answers from her deposition, in which she said that she felt *Mr. Stone's* private when he was on top her her. App. H, p. 52a) Over objection, the child's mother was allowed to testify to hearsay statements that the child made. She stated that the child told her that *Mr. Stone* had gotten on top of her and put his private between her legs. That *Mr. Stone* took his clothes off as well as the child's. She said she asked her child if she had gotten wet or anything like that and she replied she had. (App. H, p. 42a)

The child's mother testified that during several other conversations she had with her child, that the child told her that *Mr. Stone* had put his mouth on her private

area. The mother acknowledges that much of these conversations between her and her child were brought out during counseling and also by her trying to help the child understand that it wasn't her fault. (App. H, pp. 42a/43a)

On cross-examination, the mother was impeached by the absence of allegations of "private, between the legs" and the "getting wet" in her deposition. With respect to the testimony regarding "wetness" defense counsel asked "did you suggest that to her, or did she talk about it herself?" She replied, "if I'm not mistaken, that may have been said through counseling, I can't remember exactly when it was said." (App. H, pp. 43a/44a)

The State of Florida also had the victim child's mother testify about behavioral changes that she had noticed in the child. She noted that the child started having bad dreams and would wake up in the middle of the night and come to her bedroom in tears. She also noted that the child was afraid to go to the father's house.

The child victim's girlfriend Lisa Boger over objection was allowed to testify that the child told her that *Mr. Stone* had put his mouth all over her private. She was not sure if she suggested that to the victim or if the victim had said it on her own. (App. H, p. 44a)

On cross-examination, Boger stated that the child's initial allegation was that *Mr. Stone* had gotten on top of her and had his mouth on her private parts. When asked if she was sure of the testimony, she replied that she thinks the child told her that *Mr. Stone* had his mouth on her private parts. She further stated she was pretty sure that the child stated that. (App. H, p. 44a)

Boger further testified that the child said it happened more than once. In her deposition however, she stated the child said it happened only once. App. H, p. 45a)

Additionally in her deposition, Boger stated that the child never told her any details of the assault other than

the fact that *Mr. Stone* had gotten on top of her while they were both undressed. (App. H, p. 45a)

After Boger testified, but before the victim child testified, the Court cautioned the prosecution to keep the children separate. The Court stating with reference to the girlfriend Boger's testimony, "this is one sharp little cookie." At this point the trial recessed for the day. (App. 46a) Upon reconvening the trial the next day, defense counsel brought to the court's attention that the two children were playing cards in the witness room. The court made no inquiry as to any violation of the court's order. (App. H, p. 46a)

The Petitioner *Mr. Stone* testified at trial. He admitted that he had baby sat for the victim on approximately 3 occasions. He denied however, that he engaged in any form of sexual conduct with her and denied he had ever used a wash cloth on her for any purpose. (App. H, pp. 52a/53a)

Mr. Stone in his Petition for Writ of Habeas Corpus filed in the District Court, maintained that the state trial judge erred in allowing hearsay testimony through the child's mother and girlfriend in evidence over objection. Furthermore, *Mr. Stone* maintained that the state trial court erred in allowing the testimony without following the mandates of the evidence code, Florida Statute 90.803.(23) F.S. (1987). (See pp. 3/4)

Prior to trial, the state filed a Notice of Intent to use the child's hearsay statements under the above-mentioned statute. During the course of the trial, but out of the presence of the jury, the state proffered the hearsay testimony. All parties appeared uncertain as to exactly how to handle the proffered hearing. (App. H, pp. 37a-41a)

In the proffer, the child's mother testified and the child's friend Boger testified.

Mr. Stone objected to the proffered testimony. The trial judge, although expressing concern over how much influence the mother had over the child's friend, the court overruled the Petitioner's objection. The findings of fact required by the child hearsay statute were not made. (App. H, pp. 39a-41a)

The trial judge as previously noted, stated he wanted the two girls separated and that he found the friend was "a sharp cookie" and was "on the ball". (App. H, p. 46a)

The court additionally agreed that the child victim was "susceptible to influence." (App. H, p. 47a)

During the course of trial testimony, the state introduced the testimony of detective Trehy to establish a predicate for an instruction on flight that in an attempt to interview the Petitioner, staked out the Petitioner's home. He would sit down the street in his car waiting to see if the Petitioner would show up at his parents house. He never was able to locate *Mr. Stone.*

In the course of *Mr. Stone's* testimony, he admitted leaving the state of Florida and going to live in California with his sister about 2 to 3 weeks after the complaint was made. He stayed in California for approximately a year. He stated that the police never came to his house and never attempted to question him as far as he knew. He did not know the police were looking for him until he returned home. (App. H, pp. 53a-56a)

REASONS FOR GRANTING THE WRIT

Was the Petitioner's Sixth Amendment Right of Confrontation violated in a sexual battery case when the Trial Court allowed over objection, the admission of hearsay testimony of the child victim through the testimony of the child's mother and her friend.

The Petitioner *Mr. Stone* maintains in the United States District Court for the Middle District of Florida, that the hearsay testimony of the victim's mother and the girlfriend cannot be justified as a hearsay exception, and that the hearsay testimony was totally unreliable based upon the facts of the case.

The hearsay testimony complained about was critical to the prosecution's case. The child victim's testimony was so weak, that without the hearsay testimony, a conviction could not have been had in the cause. The Petitioner maintains that the impact of this testimony was strengthened with the trial judge's comment on the evidence, in its instruction to the jury on "flight" which has subsequently been held to be an improper procedure in the state of Florida, all resulted in an illegal conviction.

Mr. Stone maintains that had the trial court properly considered the criteria set forth in Florida Statute Section 90.803(23) (1987), that being;

> "unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness,"

the hearsay statement of the child victim who testifies at trial are admissible if the trial court finds "the time, content, and circumstances of the statement provides sufficient safeguards of reliability;" the court would have found therefore, that the confrontation clause of the United States Constitution would have prohibited the use of such evidence to convict *Mr. Stone.*

Mr. Stone maintains that the District Court erred in finding that although the child's mother and friend's testimony concerning statements made to them by the child victim were technically hearsay, the Appellant's right to confrontation was not violated where the victim testified and was subject to cross-examination.

Mr. Stone maintains that his Sixth Amendment Right of Confrontation was violated and as a result should be entitled to a new trial.

Mr. Stone was charged in the state court with a capital sexual battery of a six year old child. At the time of the trial, and when the child testified, she was eight years of age. It is *Mr. Stone's* contention that as a result of the inadmissible hearsay testimony, that being the testimony of the child's mother and the child's friend that his Sixth Amendment Right of Confrontation was violated and furthermore was denied a fair and impartial trial. This error was enhanced by the improper instruction on flight.

There was no medical evidence to support the child's allegations of a sexual battery. The sum total of the state's evidence was the child's testimony that *Mr. Stone* had gotten on top of her when she was in bed and that he hurt her "private". She could not define the word private and was uncertain as to whether it was below her waist. She could not recall who taught her the word. The child's testimony was repeated through her mother's statements and the child's friend's statements at trial. By repeating the child's testimony through the older witnesses, the child's testimony was given a false sense of credibility especially in view of the fact that there was no evidence to corroborate the child's testimony.

Mr. Stone initially points out to this Honorable Court that he is not simply complaining about the sufficiency of the trial court's findings as required by Florida Statute 90.803(23), F.S. (1987). *Mr. Stone's* contention deals

with his continuing objection to the hearsay testimony of the child victim's mother and her friend.

Mr. Stone contends that the testimony of the child victim would not have been sufficient to sustain a conviction of a capital sexual battery requiring a life imprisonment with a 25 year mandatory jail sentence before parole. The child's testimony is fraught with inconsistencies. On cross-examination, the child indicated that the incident happened more than twice and in her deposition she could only remember two times. With reference to the second time, the sexual assault occurred, she said it happened in the living room and that *Mr. Stone* licked her private part. In her deposition testimony, she did not remember what happened in the living room. With reference to the sexual activity in her sister's room, she testified that *Mr. Stone* had gotten on top of her and licked her private but put a wash cloth on it first. The only thing she remembered with reference to the sexual activity in her sister's bedroom during the deposition was that *Mr. Stone* told her sister to turn around and then he got on top of her.

She furthermore denied telling her friends what happened and did not know whether her mother or her friends told her what to say in court.

This testimony in and of itself would not have supported a conviction. However, this testimony corroborated by the objectionable hearsay testimony of the mother and child's friend severely prejudiced *Mr. Stone* and denied him his right of confrontation. The weakness of the child's testimony and the obvious inaccuracies apparently concerned the state appellate court as it found it necessary to specifically comment on the same in its opinion wherein it stated:

> "We are concerned by the fact that the victim could not precisely define the area of her body which she understood to be her private. Her shyness and

> embarrassment on the witness stand were completely natural, but there are not a substitute for direct evidence. We find however, that the jury could reasonably infer from the evidence that the defendant made contact between his mouth and the sexual organ of the victim." *Stone v. State*, 547 So.2d 657, 658 (Fla. 2nd DCA 1989). (App. E, p. 29a)

Mr. Stone questions as to what evidence the jury could have reasonably inferred that he had sexual contact with the victim. The jury had to rely on the corroborating inadmissible hearsay testimony of the mother and friend. The District Court's findings are in direct conflict with decisions rendered by this Honorable Court and various United States Courts of Appeal as well as Florida State Supreme Court.

In *Idaho v. Wright*, 947 U.S. ——, 111 L.Ed.2d 638, 110 S.Ct. 3139 (1990), this Honorable Court dealt with Idaho's Residual Hearsay Exception Statute. In *Wright*, a mother was charged with two counts of lewd conduct with a minor under 16, arising out of an alleged sexual intercourse between the co-defendant and her daughters. *Wright's* older daughter reported that the co-defendant had sexual intercourse with her and her sister while Wright held her down and covered her mouth. After these reports, both children were examined by physicians. One physician with extensive experience in child abuse cases examined the younger child in his office and found conditions strongly suggesting sexual abuse and vaginal contact in the previous two or three days. The younger child was deemed incapable of communicating to the jury which was not objected to by defense counsel. Having thus become unavailable as a witness, the pediatrician testified regarding statements made to him by the younger daughter. The statements basically involved answers to his questions. The trial court admitted these statements under the Idaho Residual Hearsay Exception. The Idaho Supreme Court reversed the conviction because the statements lacked the particularized guarantee of trustworthiness necessary to

satisfy the requirements of the confrontation clause. The court in ruling that the child's statements lacked "particularized guarantees of trustworthiness" pointed out that the pediatrician who conducted the interview, did so without procedural safeguards, in that he failed to video tape the interview, he asked leading questions, and had a preconceived idea what the child should be disclosing.

In affirming the lower court's granting of a new trial, this Honorable Court began with a review of important principles underlying a criminal defendant's right to confrontation.

The Eleventh United States Court of Appeals maintains that the present case is distinguishable from *Wright*, supra, in that *Mr. Stone's* case, the child victim testified and was subject to cross-examination by *Mr. Stone*. The Eleventh Circuit goes on to state in adopting the District Court's findings that if any error occurred in admitting the hearsay statements, *Mr. Stone's* confrontation rights were not violated in view of the fact that the child victim testified and was subject to cross-examination.

This Honorable Court in *Wright*, pointed out that the presumption of unreliability attending such out of court statements and the suggestive manner in which the interview was conducted, rendered them unconstitutional. This court stated:

> "If there is evidence of prior interrogation, prompting, or manipulation by adults, spontaneity may be in an inaccurate indicator of trustworthiness." (At page 659)

Mr. Stone would argue that the general principles of the Sixth Amendment Right of Confrontation cannot be summed up as simply as the Court of Appeals indicates in its ruling, that when the victim testified, the obvious hearsay testimony of the mother and friend was not prejudicial since the child was subject to cross-examination.

The Sixth Amendment Confrontation Clause guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." The United States Constitution Amendment Six, Confrontation means more than being allowed to confront the witness physically. *Davis v. Alaska*, 415 U.S. 308, 315 (1974). A criminal defendant shows a violation of the confrontation clause "by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." *Deleware v. VanArsdale*, 475 U.S. 673, 680 (1986).

As a result of the unusual problems that arise in child rape cases, various state legislations have passed such statutes as F.S. 90.803(23) which provides the method for the introduction of hearsay statements or prior consistent statements as the case may be. (See p. 3)

The current trend as to the use of these prior consistent statements in Florida is now that the child victim's hearsay statements which qualifies for stautory exception may be admissible in evidence when the child is able to testify fully at trial, notwithstanding its characterization as a prior consistent statement. Therefore, pursuant to F.S. 90.803(23), if reliable, a child's victim's hearsay is not excludable per se as hearsay, or as a prior inconsistent statement even though the child testifies at trial. However, the test does not stop there. The Courts must then apply F.S. Section 90.403 similar to the Federal Rules of Evidence 403, that the court must examine the testimony and weigh its reliability and probative value of the child's hearsay statement against the danger that the statement will unfairly prejudice the defendant, confuse the issues at trial, mislead the jury or result in the presentation of needless cumulative evidence. See *Pardo v. State of Florida*, 17 FLW S194 (Fla. 1992) (For text of 90.403 or F.R.E. 403, See pp. 415)

It is important to realize that the Florida Supreme Court encourages a balancing test by applying Rule 403.

The court in reporting from the decision of *Kopko v. State*, 577 So. 2d 956 (Fla. 5th DCA 1991) points out that by having a child testify and then routing the child's words through respected adult witnesses such as doctors, psychologists (child protection team) specialists, police and the like, with the attendant sophistication of vocabulary and description, *there would seem to be a real risk that the testimony will take on an importance or appear to have an imprimatur of truth far beyond the content of the testimony.*

The state appellate court, was obviously concerned with the legal sufficiency of the child victim's testimony, especially in view of the fact that she would not define what her "private" was. Her testimony was corroborated through the prior consistent statements of her mother and her friend, especially the mother wherein the mother testified that she had taught the child the word private in reference to her gentila. An inference of hearsay upon hearsay, with reference to the allegation that he placed his private between her legs, the mother testified that this has been brought out through counseling.

There was virtually no evidence to corroborate the testimony of the alleged victim or that of *Mr. Stone's*. Only the victim's version of the events was allowed to be repeated through these different witnesses.

Credibility certainly was an issue. We had the uncorroborated testimony of the child victim versus the uncorroborated testimony of *Mr. Stone*. The U.S. Court of Appeals cannot simply find that the confrontation rights of Mr. Stone were not violated because the child victim testified and was subject to cross-examination. Initially it was an extremely difficult task to cross-examine the prior consistent hearsay statements especially those being attributed to an 8 year old victim. Regardless of the fact that the prior consistent statements were subject to vigorous cross-examination, the fact remains

that the repetitiveness would give some credence to the victim's testimony as pointed out by the Florida Supreme Court. The Federal Rule of Evidence 403 and Section 90.403 F.S. would exclude such evidence.

The U.S. Court of Appeal, Eleventh Circuit's decision is direct conflict with the decision of this Court in the case of *Ohio v. Roberts*, 448 U.S. 66, 65 L.Ed.2d 597, 100 S. Ct. 2531 (1980) wherein this court stated:

> "In conformance with the framers" preference face to face accusation, the confrontation clause establishes a rule of necessity. Including cases where prior cross-examination has occurred, the prosecution must either produce, or demonstrate the unavailability of a declarant whose statement it wishes to use against the defendant."

The *Robert's* court went on to address the problem of the unavailable declarant, noting there is not a confrontation clause violation if the declarant's statements carry "sufficient indicia of reliability" even though the declarant is not produced at trial. (44 U.S. at 65-66)

Six years after *Roberts's*, it's holding was clarified by this Honorable Court in *United States v. Inadi*, 475 U.S. 387, 89 L.Ed.2d 390, 106 S.Ct. 1121 (1986). In *Inadi* the court stated:

> "If the declarant is available and the same information can be presented to the trier of the fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version. When two versions of the same evidence are available, the long standing principle of hearsay, applicable as well to the confrontation clause analysis, favor the better evidence. (475 U.S. at 394)

There is no question in this case that the child victim did testify. There was no necessity to bring in the hearsay witnesses because "the better evidence" was available and presented to the jury. The introduction of the

hearsay testimony violated *Mr. Stone's* right under the confrontation clause.

It has been argued to this court that the uncorroborated testimony of the child victim established its credibility through that of the hearsay testimony of the child's mother and girlfriend. Additionally, by the trial judge instructing the jury on the "alleged flight of *Mr. Stone*", such instruction and comment on the evidence further strengthened and gave credence to the victim's testimony. The Judge instructed the jury as follows:

> "Now, although the flight of a person during the commission of a crime or from a crime scene places no presumption of guilt, it may be considered along with all other testimony and circumstances as a circumstance from which guilt may be inferred." (Trial Transcript, Pg 325)

A flight instruction should only be given when evidence of flight is clearly established. *Williams v. Florida*, 378 So.2d 902, 903 (Fla. 5th DCA 1980). The current state of law in *Florida* is set forth in a recent Florida Supreme Court decision of *Fenelon v. State*, 17 FLW S112 (Fla. 1992) wherein the Florida Supreme Court stated in all future cases where evidence of flight has been properly admitted, the better policy is to reserve comment to counsel with the jury instruction on flight not being given.

Additional compelling precedence warranting the issuance of this Petition for Writ of Certiorari are the following:

A. The Fifth Amendment: in that no person shall be deprived of life, liberty or property without due process of law.

B. The Sixth Amendment: in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him and to have the assistance of counsel for his defense.

C. The Fourteenth Amendment: no state shall make up or enforce a law which shall abridge the privileges or immunities of the citizens of the United States nor shall any state deprive a person of life, liberty or property without due process of law nor deny any other person within its jurisdiction equal protection of the law. These various bill of rights were established as the preamble to the United States Constitution, that is "to form a more perfect union, to establish justice . . ." The establishment of justice does not mean to those select few. It means to all and it means to all equally.

CONCLUSION

It is most respectfully urged that this Honorable Court should grant the Writ of Certiorari for the following reasons:

In that the Fifth, Sixth and Fourteenth Amendments to the United States Constitution would prohibit sustaining a conviction by the use of such inadmissible hearsay testimony ruled admissible in the state trial court proceedings.

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